

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUAN NUNEZ,

Plaintiff,

v.

ORDER
03-CV-93A

VICTOR HERBERT, et al.

Defendants.

This case was referred to Magistrate Judge Leslie G. Foschio, pursuant to 28 U.S.C. § 636(b)(1), on November 15, 2005. Defendants filed a motion to dismiss for failure to state a claim or for judgment on the pleadings. On February 21, 2007, Magistrate Judge Foschio filed a Report and Recommendation, recommending that defendants' motion to dismiss be granted.

Plaintiff filed objections to the Report and Recommendation on March 5, 2007.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a de novo determination of those portions of the Report and Recommendation to which objections have been made. Upon a de novo review of the Report and Recommendation, and after reviewing the plaintiff's objections, the Court adopts the proposed findings of the Report and Recommendation.

Accordingly, for the reasons set forth in Magistrate Judge Foschio's Report and Recommendation, defendants' motion to dismiss is granted and the complaint is dismissed, without prejudice, with leave to file an amended complaint.

Plaintiff is advised that an amended complaint is intended to completely replace the prior complaint in the action, and thus it "renders [any prior complaint] of no legal effect." *International Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977), *cert. denied sub nom., Vesco & Co., Inc. v. International Controls Corp.*, 434 U.S. 1014 (1978); *see also Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994).

Plaintiff is forewarned that if he fails to file an amended complaint as directed, the complaint will be dismissed with prejudice.

Plaintiff shall file his amended complaint by **May 4, 2007**. The Clerk of the Court is directed to send to plaintiff with this order a blank complaint form and the instructions for preparing an amended complaint. In the event plaintiff fails to file an amended complaint as directed above by **May 4, 2007**, the complaint shall be dismissed with prejudice without further order of the Court.

In the event the complaint is dismissed because plaintiff has failed to file an amended complaint by **May 4, 2007**, the Court hereby certifies, pursuant to 28 U.S.C. § 1915(a), that any appeal from this Order would not be taken in good faith and leave to appeal to the Court of Appeals as a poor person is denied. *Coppedge v. United States*, 369 U.S. 438, 82 S. Ct. 917, 8 L. Ed.2d 21 (1962).

Further requests to proceed on appeal *in forma pauperis* should be directed on motion to the United States Court of Appeals for the Second Circuit in accordance with Rule 24 of the Federal Rules of Appellate Procedure

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATED: March 30 , 2007